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Sexy Legal History: Mapping Sexualities in a Handbook

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Luisa Stella de Oliveira Coutinho Silva

Sexy Legal History: Mapping Sexualities in a Handbook

The innovations achieved in the early 1970s by the feminist and post-structuralist movements changed different fields of the social sciences, opening up a space for critical approaches that explored the differences between what has been defined as man and woman in different but interacting disciplines. Within the field of history, both the Annales school and the »archival turn« provided the theoretical background for the empirical investigation of historical sources via new lenses, resulting also in the development of women's history. Over time, the interaction between the disciplines of law, history, as well as women's and gender studies promoted specific developments and intersectional connections that improved the discussion of the conceptions of sex and gender, not to mention created new and productive fields of research in legal history.

In the 1970s, critical legal theory was also endorsing legal arguments for sexual equality reforms, establishing the premises for feminist jurisprudence and feminist legal theory. However, legal feminists could not agree on a concise agenda and used different approaches, e.g. liberal equality, sexual difference, dominance and anti-essentialist. Feminist legal history was shaped by these influences and took on various denominations, as recent publications demonstrate: »Feminist Legal History« (2011), »(Wo)men Legal History« (2016) and »European Women's Legal History« (2017).¹ While new fields began to interact with legal history, effectively feeding modern legal criticisms, the most recent advances reveal a richness of publications that have given body to a field that can still be seen under different labels – a variety that

even manifests itself in courses offered at law schools, e.g. feminist legal history, women's legal history, transgender legal history, queer legal history, as well as lesbian and gay legal history. They all reflect, in different ways, on how sexual orientation and gender differences were treated in the past, which involved problematizing the basis of gendered and heterosexual subjectivities and dismantling the idea of heteronormativity as universal. They also challenged the notion of sex as naturally immutable, highlighting it as a tool used in law to normalize sexualities.

While the difference between men and women focused exclusively on biologically given sexes, in the 1980s reflections on this difference shifted toward an understanding of gender identities as socially constructed concepts and social-historical creations. In the field of history, Scott (1986)² questioned gender as a category of historical analysis, and proposed to shift the focus of the analysis of the difference from women's history to gender legal studies and history: the investigation of the meanings of »woman« and »man«, using source materials, began to unravel its historically constructed »nature«. Male and female were merely different series of behavioral codes. At this point, publications started to emphasize gender – the publications of the research network »Gender Differences in the History of European Legal Cultures«³ being a good example, as well as the publication of »Engendering Legal History«.⁴

Despite having made some advances, the feminist and gender claims were insufficient to uphold the pluralism of sexual identification, considering that while sex-based discrimination was no longer

1 SEBASTIAAN VANDENBOGAERDE et al. (eds.), *(Wo)men in Legal History*, Lille 2016; TRACY THOMAS, TRACEY JEAN BOISSEAU (eds.), *Feminist Legal History. Essays on Women and Law*, New York 2011; SARA KIMBLE, MARION ROWEKAMP (eds.), *New Perspectives on European Women's Legal History*, New York 2017.

2 JOAN W. SCOTT, Gender: A Useful Category of Historical Analysis, in: *The American Historical Review* 91, 5 (December 1986) 1053–1075.

3 East meets West: a gendered view of legal tradition: sixth conference of the International Research Network »Gender Differences in the History of European Legal Cultures«, Budapest March 10th–12th, 2011.

4 FELICE J. BATLAN, Engendering Legal History, in: *Law & Social Inquiry* 30, 4 (2005) 823–851.

legally permissible, discrimination regarding sexual orientation remained legal and affirmed. Furthermore, while a perspective on how normativities treated women and men in the past could explain much about the present, or even how the historiography perverted the analysis of the past, it could not grasp the men and women who sexually opted for people of the same sex. This approach opened up new interpretations of sources in gay and lesbian legal history.

The turn of the millennia witnessed the rise of several related fields of study, such as masculinities, LGBTI and transgender studies. »Trans studies« became an umbrella term for a range of trans-subjectivities, for people who seek or have a sex that differs from the assigned one. It opened a window for an alternative interpretation of how law dealt with sex differences in the past that goes beyond the binary understanding of »man vs woman«, thus providing evidence in support of transgender legal history. Similarly, queer legal history also seemed to deny the well-established naturalization of binary sexual identities. Critical of both feminist, gay and lesbian studies, it focuses on the performativity associated with these categories. This approach defends that sexuality is fluid, with multiple possibilities for realization.

As one can see, thinking about sexualities, gender, queer, LGBTI studies, and legal history touches on complex, interdisciplinary and intersectional fields that still belong to different denominations. They question, from different perspectives, global inequalities, sexual and gender classifications, colonial legacies and imperial occupations, the role of different normativities in the past, and the contradictions and anachronisms of linear rather than plural interpretations. The relationships people have to sex and norms are by no means uniform, neither with regard to the past, nor across the globe, nor (in some cases) even with regard to their own cultural code. The understanding of gender identity (cisgen, transgender, transsexual) and sexual orientation (homosexual, heterosexual, bisexual) can help in understanding the forms of sexuality expressed in the past and undermine dominant narratives in legal history to reveal new agents and relations that were marginalized.

Henceforth, I propose to analyze this approach in the *Oxford Handbook of Legal History*, acknowledging not only the complexity of studying sex, gender, and sexualities, but also its specific importance for legal history and other fields in the social

sciences. It is no longer possible to ignore the conversation between legal history and gender studies, feminist legal history, queer legal history, and LGBTI legal history.

A general panorama among the contributions of the handbook reveals just how differently the authors address the issue I focus on here. Throughout the handbook, topics related to women and gender, sexualities, and LGBTIQ studies appear in some of the contributions, usually as examples. Nevertheless, two papers more explicitly mention the importance of sexualities and legal history. In »&: Law Society in Historical Legal Research« (479–496), Catherine Fisk stated that the development of »women's, gender, LGBTQ, and sexuality studies expanded the range of ways in which law can be studied historically« (484). Lena Salaymeh, in her article »Historical Research on Islamic Law« (757–775), highlights how the nuances and varieties of women's experiences, critical feminist theory, and queer theory could immensely deepen historical research on Islamic law and women, along with other disempowered groups (773).

While the editor's preface claims that the purpose of the handbook is to search for the variety of research conducted on legal history around the world, almost half of the contributions are from authors affiliated with institutions in the United States. There are no contributions from Latin America and no authors writing about the Latino context. Moreover, all of the European contributions come from three countries (the UK, Germany, and Finland), and Asia is heavily under-represented: there is one paper about Chinese legal history, one paper on Islamic legal history, and one on Indian legal history. The lack of attention paid to the latter is particularly surprising because of the well-developed body of studies involving sexualities and legal history, especially in postcolonial settings. Lastly, only one third of the authors are women – a fairly small minority by almost any account.

Out of all the contributions in the handbook, just three directly address the subject matter we take up here in our analysis. The first contribution analyzes how sex and gender matter when analyzing the history of crime, both for those who committed the crime and those who suffered the offense. Written by Carolyn Strange, »Femininities and Masculinities: Looking Backward and Moving Forward in Criminal Legal Historical Gender Research« (221–241) departs from the premise that

»law is awash with gender«. Her analysis unpacks the criminal legal history of gender, where, unlike in family law, anyone can commit and/or be the victim of crimes. Notwithstanding, the main point is to analyze how criminal law reads perpetrators and victims in terms of gender.

The author reviews the literature on the foundational works that connected gender and criminal legal history as well as how criminal justice processes made gender. Although specific crimes have as their prerogatives the difference of gender, such as abortion, prostitution, and infanticide, Strange focuses her review on »fatal femininities and masculinities« and how scholars interpreted men and women who murdered intimates throughout U.S. and British history. She also analyses rape histories, defending that legal history can help in finding a way beyond the dual interpretation of these cases: the tacit acceptance of the inevitability of sexual aggression and the culpability of patriarchy for inequalities. Moreover, she considers a certain »exceptionalism« due to American racism during slavery times and following emancipation. Race and class mattered in this context, as supported by intersectionality, a methodological tool that involves the analysis of subjects by taking into consideration age, class, race, ethnicity and religion, thereby opening up a space for multiple masculinities and femininities.

Finally, Strange offers suggestions for new subfields and directions for future research. She emphasizes that scholars should both make use of digitized historical records and pay close attention to the new forms of analysis data mining makes possible.

The second contribution directly addresses the theme of feminist legal history: »Feminist Historiography of Law: exposition and proposition« (603–620), written by Maria Drakoupolos, a specialist in feminist legal theory. Her proposal is to offer a critical analysis of feminist legal history based on a review of the state of the art in the »English speaking world«. She identifies two major categories where themes on feminist legal history fit: the law's treatment of women and women's attitude toward law. The first scrutinizes how law treated women in different historical periods, asking how legal structures, practices, and institutions marked women's experiences and existences in general. The work and research produced by this first group demonstrate law's authority to control women's lives and women's personal and affective

existence in the public and private spheres. Rather than the law, women make up the starting point of the second category of analysis, which asks about the nature of the relationship between law and women from the perspective of women, what rights were denied to women throughout history and how did they speak out and struggle for legal change. It is also possible to find histories examining both women's courage and bravery in confronting the law and how they refuse to accept their fate.

Confronting these two positions, Drakoupolos pursues an independent critical approach – one that goes beyond these two previous dominant positions. Up till now, these ideas only contributed to the creation of a paradox in feminist legal history: on the one hand, the definition of feminist legal history points to an institutional autonomy, and on the other, it is intellectually dependent upon its related fields, women's studies and law. Strange contends that we need to understand law's nature and form of power in ways other than that operating solely on the social terrain where it affects women. She advocates a different understanding of the nature of law and power: law is to be understood as a distinct body of knowledge with a history of its own that goes beyond the relationship between women and law. A re-reading of the tradition of law employing the analytics of sexual difference, she contends, would lay bare the logic of divisions in law and its role in the creation and maintenance of this difference. Instead of history, one should look to the law's past. In this way, feminist legal history should operate as a methodological stance, adding a historical dimension to feminist legal scholarship's diagnoses and concerns about the present relationship of women and law.

The third contribution suggests new avenues for the field of queer legal history to pursue. »Queering Law's Empire: Domination and Domain in the Sexing up of Legal History« (641–659), by David Minto, surprises the reader with the assumption that the queer critique of law has made progress in demonstrating how law's operations serve dominant interests to normalize gender and sexualities (also known as heteronormativity). Law wields power over sexual subjectivities, subcultures, identities, bodies, and lives.

Just as in the previous contribution, Minto provides an introductory state of the art focusing on US scholarship and his own assessment regard-

ing future research in the field. He identifies two ways of understanding what queer is from a legal historical standpoint. The first refers to the works centered on people who are gay, lesbian, or LGBTQ. The second, taking aim at studies against the fixity and coherence of identitarian terms, is a critique of normativity based on post-structuralism and the performative aspects of gender and sexuality.

As for queer legal history, one possible approach is to examine domination, that is, the way law dominates queer subjects. Another possibility he refers to as »the domain« is based on the rise of LGBT activism and rights claims at the local, national, and international levels – all beyond the sole overview of the western perspective. Queer human rights claim to shift paradigms in the legibility of human rights. The inclusion of queerness into the global framework of human rights helps to remedy the continued lack of comparative reflection regarding jurisdictions or transnationally across their bounds. It is, nevertheless, still necessary to get closer to the Global South and transnational perspectives in order to contribute even more to how the regulation of sex and intimacy was determinant to these spaces.

To finish, Minto points out two ways for the development of queer legal history. First, he recommends that legal historians look at the historical circumstances in which queerness presented a »hard case« that challenged the law or even created a jurisprudential paradigm shift. Second, there must be an awareness of the problems associated with the gaps in queer legal history. When someone comparatively reflects on queerness in legal history, whether among different jurisdictions or transnationally across their borders, how might this take legal historians beyond jurisdictional domains: Transnational queer legal history must be wary of universalizing any claims made about law's relationship to gender and sexuality. The relations between sexual regulation and geopolitics represent areas of investigation capable of reframing how we think of them. Much like Ann Stoler, cited in the paper, exploring imperial terrains could and can show ways in which the regulation of sex and intimacy was constitutive of imperial power.

All three contributions lay out their claims for the future of the perspectives they write about. Despite this, they exhibit different ways of understanding legal history using methodological per-

spectives from the spheres of gender and sexualities. What they all have in common is that they directly or indirectly point out that there is no way back to the former uses of gender and sexualities as tools of interpretation and understanding in legal history. It is commendable that such a discussion of these fields, especially queer legal history, the most recent of them, takes place in the handbook. The same, however, cannot be said about transgender legal history, which is completely absent from the book.

Furthermore, they do not focus simply on »family law« or even specific institutions associated with women or gender such as marriage, divorce, and concubinage. These contributions demonstrate that discussions about gender and sexualities can be found in a number of other areas of law. The handbook should, in general, be praised for seeing gender in all facets of law, as it should be.

The three contributions make a clear division among the fields and studies on gender and sexualities, including feminist history, women's legal history, queer legal history, and an analysis of how the difference between men and women can be a tool to understand criminal legal history. This is an important assumption because the lived experiences and different social contingencies of men and women, transsexuals, queers and gays were different in the past. But within each of the fields, the vulnerability of black women, indigenous women, poor women, and so on is touched on differently because of their difference. This is both a justification for the separation of the different analytical fields and an appeal for strengthening the intersectional interlaces.

Furthermore, although the discussions on gender and sexualities are present in this handbook, and taken seriously, they belong to a specific space and language: the Anglo-American world. The three focus their lay of the land solely on the English-speaking tradition, and here it should not be forgotten that this is but *one* facet of the »Western« way of seeing and constructing gender. The multiplicity cannot be transformed into an isolated analysis of the future of a field or fields in a very specific part of the globe, bypassing what is happening (and has already happened) in other places and traditions. As is implicit in the texts, gender and sexualities contribute to the localization of law; law is not static, it is not universal, neither autonomous nor closed. In this respect, the contributions only partially represent the state of the

discipline, and as such they do not demonstrate the promised variety of research on legal history going on around the world.

Finally, the role of archives does not occupy a central place in any of these papers. As the archival turn has shown, there is a wealth of information contained in the primary sources, in the politics behind the archival structures, not to mention the new interpretations of the sources first made possible by these new gender-focused approaches in legal history. In many respects, archives can be considered historical agents, with their own ways of excluding and including subjects. Since the topic deals with people who were treated as deviants, vulnerable, or uncomfortable, with regard to normative sexuality and gender in the past, they were frequently constructed as the criminal, crazy,

or mentally ill individuals. While these are all possible places to find gender and sexualities in legal history, they can be hidden by a given archive's classificatory system. Archives have been relevant for both advancing and entangling discussions that connect archives, women, gender studies, law, colonial subjects, and their hybrid nature in describing the other. Thus, one needs to remain flexible and find what »is not even there«. That is why speaking of »queering« the archives, for instance, can question the dominant taxonomies that complicate legal historians' efforts in finding the expressions of sexualities in the past, which in the end are people who did not suit general and dominant categories of »law«.

